Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE CLOROX COMPANY,
Petitioner,

VS.

VANESSA HAILE,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1996), is there any constraint upon a court of appeals' discretion in allowing a § 1292(b) appeal once the district court has made the required certification, and the petitioner has made a timely application to the court of appeals?

2. Under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1996), must the party seeking to appeal show that his appeal presents exceptional circumstances in addition to the requirements set forth in § 1292(b)?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceedings below are Defendant, The Clorox Company, and Plaintiff, Vanessa Haile. The Clorox Company is a publicly owned company. The Clorox Company has no parent company or nonwholly owned subsidiary company excluding foreign ownership interests.

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PETITION FOR WRIT OF CERTIORARI

The Clorox Company ("Clorox") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 25, 1996.

OPINION BELOW

The unpublished Order and Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated November 25, 1996, is reprinted in Appendix A, p. A-1.

The September 26, 1996 Amendment of Order of the United States District Court for the District of Columbia, certifying its August 6, 1996 order for immediate interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), is reprinted in Appendix B, p. A-3. The August 6, 1996 Order and Memorandum Opinion of the District Court is reprinted in Appendix C, p. A-5.

JURISDICTION

Plaintiff brought this action in the Superior Court for the District of Columbia. On September 7, 1994, Clorox removed this action to the United States District Court for the District of Columbia. On August 6, 1996, the District Court denied Clorox's first and second motions for summary judgment which turned on the legal issue of whether Plaintiff's claims alleging inadequate product labeling are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). On September 26, 1996, the District Court amended its August 6, 1996 order, certifying for 1292(b) appeal the issue of preemption of Plaintiff's claims by FIFRA.

On October 7, 1996, Clorox petitioned the United States Court of Appeals for the District of Columbia to permit the Section 1292(b) appeal, as certified by the District Court.

On November 25, 1996, the Court of Appeals for the District of Columbia denied Clorox's petition, stating:

> The case does not present exceptional circumstances that would justify an immediate appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

App. A, p. A-1.

Jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Clorox petitioned for permission to appeal pursuant to 28 U.S.C. § 1292(b), which provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order invokes a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order. . ..

STATEMENT OF THE CASE

This lawsuit arises out of injuries Plaintiff sustained on August 13, 1991 when she used Combat Room Fogger, a general release pesticide fogger allegedly sold by Clorox. Contrary to the warnings placed on both the canister and packaging, Plaintiff placed the fogger inside a kitchen cabinet and failed to extinguish the pilot lights on the nearby stove. The resulting flash fire caused her to sustain burn injuries.

In her six-count Complaint against Clorox, Plaintiff seeks damages on the theories of strict liability in tort, negligence, breach of warranties, Federal Hazardous Substance Labeling Act violations, and gross negligence.

On January 11, 1996, Clorox filed five motions for summary judgment, each addressing different flaws in Plaintiff's allegations. In an August 6, 1996 Order, the District Court granted Clorox's third and fifth motions for summary judgment, disposing of claims which Plaintiff had not or could not pursue. The District Court reserved ruling upon Clorox's fourth motion, which addressed inadequacies in Plaintiff's expert testimony and her resulting inability to make a submissible product liability case. Clorox's first and second motions would have been dispositive of Plaintiff's entire case, and these motions turned upon whether Plaintiff's claims alleging inadequate product labeling are preempted by FIFRA.

The District Court denied Clorox's first and second motions for summary judgment. In doing so, the District Court relied upon the holding of the Court of Appeals in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984) that FIFRA does not preempt common law claims. In the Order denying Clorox's Motions, the District Court stated that it could not "overlook the profound effect *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), has had in other Circuits on claims similar to plaintiff's." App. C, p. A-10. Indeed, all eight of the courts of appeals to consider FIFRA preemption since 1991 have held that such preemption extends to common law claims, relying upon this Court's opinions in *Cipollone* and *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996). *See Grenier v. Vermont Log Buildings*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours and Co.*,

996 F.2d 1346 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated, sub nom. Papas v. Zoecon Corp.*, 505 U.S. 1215 (1992), *on remand,* 985 F.2d 516 (11th Cir.), *cert. denied, sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

However, the Court of Appeals' pre-*Cipollone* opinion in *Ferebee* held that FIFRA preemption does not extend to common law claims. The District Court left "to the Court of Appeals of this Circuit the prerogative of overruling its own decisions." App. C. p. A-11. In its Amended Order, the District Court concluded that Clorox had satisfied the criteria set out in 28 U.S.C. § 1292(b) for an interlocutory appeal. App. B, pp. A-3 - A-4.

In its Petition, Clorox asked the Court of Appeals to take the opportunity to reconsider its ruling in *Ferebee*, given the manifest importance of the issue to this case and in the interest of judicial economy. Similar pre-emption issues have been presented for appellate review under § 1292(b). *See, e.g., Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986). The Court of Appeals denied the application because "the case does not present exceptional circumstances that would justify an immediate appeal." App. A, p. A-1.

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari to resolve the conflict in the federal circuits about the proper application of the Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1996). There are two subjects implicated by the Court of Appeals' opinion which need clarification. First, is there any constraint upon the courts of appeals' discretion to allow or deny a §1292(b) appeal if a timely application from a certified order has been filed? Second, are there any requirements beyond those set forth in the statute that must be met before a §1292(b) appeal may proceed, i.e., must the Petitioner show that his appeal would present "extraordinary circumstances"? As discussed below, the courts of appeals and district courts apply divergent analyses to these matters and clarification from this Court is needed.

By clarifying the requirements of § 1292(b) and the scope of appellate discretion, this Court would further Congress' intent to provide statutory authority for federal courts to improve the federal court system:

> If the discretion which this legislation affords is properly used, the procedures of this legislation should result in improving the administration of justice within the Federal court system. For these reasons, the committee believes that the legislation is desirable and should be favorably considered.

S.REP.NO. 85-2434, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5258.

A. There Is Conflict Among The Courts Of Appeal As To Whether 28 U.S.C. § 1292(b) Imposes Limitations On Their Discretion To Permit An Appeal.

1. Section 1292(b) does not impose any constraints on the Courts of Appeal's discretion.

The Interlocutory Appeals Act requires that a party seeking an interlocutory appeal of an order prove to the district court the following: 1) that the order involves a controlling question of law; 2) that there is substantial ground for difference of opinion on the controlling question of law; and 3) that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Once satisfied that the three statutory requirements are met, the district judge must so state in writing. *Id.* If the party makes a timely request to the court of appeals, the court of appeals may hear the appeal or decline to hear the appeal, "in its discretion. . . ." The statute does not specify or otherwise limit the factors which the court of appeals may consider in exercising its discretion.

Thus, if the district court has, in writing, certified an order for § 1292(b) appeal, and a timely petition to hear the appeal is filed with the court of appeals, then the court of appeals is free to exercise its discretion to allow or refuse the appeal, as it sees fit. The court is not required to review the determination by the district court that the section 1292(b) requirements are met, nor is it required to make any particular determination as a prerequisite to hearing the appeal. Whether to allow the appeal is purely a question of whether the court wants to hear it.

Similarly, the court may decline to hear a 1292(b) appeal for any reason it chooses. The court may decide that it does not have room on its docket to review any additional cases, or it may decide that it does not want to address the particular issue presented by the certified order. The court has unfettered discretion.

Although it is not necessary to consult the legislative history to interpret the clear language of the statute, the legislative history is consistent with it.

> The granting of the appeal is [] discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari. It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

S.REP.NO. 85-2434, at 3, 1958 U.S.C.C.A.N. at 5257.

2. The Federal Courts of Appeal have divergent views of their discretion under § 1292(b).

Some federal courts of appeal do not impose any constraints upon their discretion to allow a § 1292(b) appeal. For example, the Third Circuit in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3rd Cir. 1974), acknowledged that § 1292(b) imposes three statutory criteria that limit the district court's exercise of discretion to grant certification. The court then compared the district court's discretionary authority to that of the the appellate court and concluded that, unlike the district court's discretion, "the discretion to grant leave to appeal at the circuit level is not limited by any specific criteria." *Id.* In *Katz*, the district court had ruled that the case could be maintained as a class action, but certified the order for interlocutory appeal. *Id.* at 751. The appellate court

exercised its discretion to grant the appeal and reversed the district court's order. *Id.* at 764.

Similarly, other federal courts of appeal freely exercise their discretion to grant or deny a timely filed application for interlocutory appeal from a certified order. Often, the appellate court simply states that it exercises its discretion with no reference to the statutory requirements for district court certification. *See, e.g., E.A.S.T., Inc. of Stamford, Conn. v. M/V Alaia*, 876 F.2d 1168, 1171 (5th Cir. 1989) (order was immediately appealable, because the district court certified the orders for appeal under Section 1292(b)); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 n.8 (3rd Cir. 1986) (when a district judge states in writing that the three statutory requirements have been met, the Court of Appeals which would have jurisdiction of an appeal of such action may thereupon in its discretion permit an appeal to be taken from such order if the application is made within ten days); *Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3rd Cir. 1981) ("Section 1292(b) permits appeals of interlocutory orders upon certification by the district judge and permission by the Court of Appeals"); *Driver v. Helms*, 577 F.2d 147, 149 (1st Cir. 1978), *rev'd on other grounds*, 444 U.S. 527 (1980) (court of appeals had jurisdiction over appeal where district court denied motions but certified that questions involved controlling issues of law as to which there was substantial ground for difference of opinion and that immediate appeal would materially advance litigation); *Obron v. Union Camp Corp.*, 477 F.2d 542, 543 (6th Cir. 1973) (appellate court granted review, because district court properly certified order); *Akers v. Norfolk & W. Ry. Co.*, 378 F.2d 78, 79 (4th Cir. 1967) (exercising its statutory discretion, appellate court declined petition for appeal); *Wall v. Chesapeake & O. Ry. Co.*, 339 F.2d 434, 435 (4th Cir. 1964) ("in its discretion," court of appeals denied petition for appeal from the interlocutory order); *Milbert v. Bison Lab. Inc.*, 260 F.2d 431, 434 (3rd Cir. 1958) (whatever the reason, the ultimate determination concerning the right of appeal

is within the discretion of the judges of the appropriate Circuit Court of Appeals).

Other courts of appeals explicitly impose additional restrictions upon their discretion in granting a § 1292(b) appeal. For example, in *Klinghoffer v. S.N.C. Achille Lauro Ed Altrigestione Motonave Achille Lauro in Amministrazione Straordinaria 1990*, 921 F.2d 21, 22 (2nd Cir. 1990), the district court had denied a defendant's motion to dismiss the complaints and third-party complaints for indemnification or contribution against it in a consolidated action arising from the forcible seizure of the Achille Lauro. The bases of defendant's motion to dismiss included lack of subject matter jurisdiction, lack of personal jurisdiction, immunity as a sovereign state, lack of capacity to be sued, and improper service of process. *Id.* at 23. Thereafter, the district court granted defendant's § 1292(b) motion for certification. Defendant timely filed an application for interlocutory appeal. Analyzing § 1292(b) to determine whether to grant the appeal, the Second Circuit explicitly stated:

> Before deciding whether we should exercise our discretion under the statute to accept the appeal, we must first determine whether the district court properly found that the requisites for section 1292(b) have been met.

Id. The appellate court then analyzed whether there was a "controlling question of law." Reasoning that § 1292(b) did not require the issue to be important to a large number of other cases to be classified as a controlling question of law, the appellate court concluded that the order involved controlling questions of law. *Id.* at 23-25. The appellate court stated that its "inquiry, however, [did] not end there," and also determined whether the district court properly found that substantial grounds for difference of opinion existed and that resolution would materially advance the ultimate termination of the litigation. *Id.* at 25. After conducting its review of the district court's certification, which

it felt compelled to do, the appellate court then exercised its discretion and granted defendant's petition for appeal. *Id.*

Other courts of appeal impose similar requirements. For example, some impose the prerequisite that the appellate court assess whether an immediate appeal may materially advance the ultimate termination of the litigation; other courts impose the requirement that both the appellate court and district court make the required § 1292(b) certification before the appellate court believes that it has jurisdiction. *See, e.g., Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 658-59 (7th Cir. 1996) (the appellate court analyzed whether the three statutory requirements had been met before concluding that "the appeal [was] within [its] jurisdiction"); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318-19 (9th Cir. 1996) (although it concluded that it had jurisdiction under § 1292(b), the appellate court entertained defendant's contention that it lacked jurisdiction on the ground that the order certified by the district court did not involve a controlling question of law, stating that it had an independent duty to confirm that its jurisdiction was proper); *White v. Nix*, 43 F.3d 374, 376-79 (8th Cir. 1994) (appellate court stated that it was obligated to raise jurisdictional issue of whether district court abused its discretion in finding that the three statutory criteria had been met); *Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Distribution Corp.*, 964 F.2d 85, 88 (2nd Cir. 1992) (court misstates that "Section 1292(b) provides that, if both the district court and the court of appeals make the required certification, an appeal may be taken from an interlocutory order not otherwise appealable"); *Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 777 F.2d 598, 608 n.27 (11th Cir. 1985) ("[s]ection 1292(b) also requires us to assess whether an immediate appeal may materially advance the ultimate termination of the litigation"); *Groover, Christie & Merritt v. LoBianco*, 336 F.2d 969, 970 (D.C. Cir. 1964) (court of appeals first determined whether it was "satisfied that the

District Judge correctly discerned the importance of the issue" before it "decided to allow the appeal").

In this case, the Court of Appeals denied Clorox's petition for permission to appeal because "[t]he case does not present exceptional circumstances that would justify an immediate appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)." App. A, p. A-1. (the *Livesay* case involved a §1292(b) appeal; this Court addresed §1292(b) in dictum.) The referenced portion of the *Livesay* opinion is a partial quote from a Seventh Circuit case, which reads in full:

> In every application under §1292(b) the appellant has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment. Of paramount importance is the requirement that immediate review will "materially advance the ultimate termination of the litigation."

Fisons Limited v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972) (footnote omitted). Contrary to *Fisons* and the opinion of the Court of Appeals in this case, the only burden upon the party seeking a 1292(b) appeal is to show that the district court has made the required certification and to make a timely request to the court of appeals. If the court of appeals wishes to hear the appeal, it may do so without any further showing by the requesting party.

The Court of Appeals' decision in this case, as in the *Fisons* case, sets barriers to the exercise of the court of appeals' discretion which do not exist in the statute. The premise that an appellate courts' discretion is constrained by any limitations is unfounded. Therefore, this Court should clarify that 28 U.S.C. § 1292(b) does not set any barriers to the court of appeals' discretion. Rather, the appellate courts that are presented with a timely application for interlocutory appeal from a properly

certified order are automatically conferred with jurisdiction and the unlimited discretion to deny or grant the appeal.

B. Conflict Exists Among The Federal Courts As To Whether A Party Seeking An Interlocutory Appeal Must Demonstrate That The Appeal Presents "Exceptional Circumstances" In Addition To The Statutory Requirements Under 28 U.S.C. § 1292(b).

Section 1292(b) does not require a party seeking an interlocutory appeal to prove that "exceptional circumstances" are present in the case as a prerequisite to an appeal. However, the "exceptional circumstances" phrase appears in many 1292(b) cases. The function of the "exceptional circumstances" analysis varies from case to case. Some federal courts require a party to demonstrate that a controlling question of law exists, on which there is substantial ground for difference of opinion, that immediate appeal may materially advance ultimate termination of the litigation, *and* that "exceptional circumstances" exist. For example, in *Williams Corp. v. Kaiser Sand & Gravel Co.*, 146 F.R.D. 185, 188 (N.D. Cal. 1992), defendants sought certification of the district court's order approving class certification. The district court denied defendants' motion for § 1292(b) certification on the sole ground that defendants had not met their burden of showing exceptional circumstances. In fact, the district court did not analyze whether defendants' met the three statutory requirements for § 1292(b) certification:

> Putting aside the questions of whether [the three statutory requirements have been met], Defendants have pointed to no exceptional circumstances which justify departure from established practice.

Id.

Likewise, other federal courts place an added burden, which is not contained in the express, unambiguous statute, that a party seeking an interlocutory appeal prove an additional element of exceptional circumstances. *See, e.g., Fisons Limited v. United*

States, 458 F.2d 1241, 1248 (7th Cir. 1972) (appellant had burden of persuading court of appeals that exceptional circumstances existed in addition to showing that the district court had made the required certificaton); *In re Arochem Corp*, 198 B.R. 425, 427 (D. Conn. 1996) ("in addition [to § 1292(b)'s three statutory requirements] 'exceptional circumstances' must exist"); *In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 28 (S.D.N.Y. 1995) (leave to appeal granted only if the statutory requirements are met, and "moreover, . . . only in 'exceptional circumstances'"); *State ex rel. Howes v. Peele*, 889 F. Supp. 849, 852 (E.D.N.C. 1995) (Statutory requirements "should be treated as guiding criteria" with additional consideration given to whether movant satisfies the burden of persuading the court that "'exceptional circumstances' justify a departure from [the policy of postponing appellate review]"); *In re IBI Security Serv., Inc.*, 174 B.R. 664, 669-671 (S.D.N.Y. 1994) (analyzing whether the three statutory requirements had been met and whether "exceptional circumstances" had been shown); *Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319, 321 (E.D.Pa. 1994); *McNeil v. Aguilos*, 820 F. Supp. 77, 79 (S.D.N.Y. 1993) (the three statutory "prerequisites create a significant hurdle to certification, and the barrier is elevated by the mandate that section 1292(b) be 'strictly limited' because 'only exceptional circumstances'" will justify an interlocutory appeal); *In re Tetirick*, 84 B.R. 505, 507 (S.D. Ohio 1988) (the three statutory requirements must be satisfied; "[f]urthermore, it must be established that 'exceptional circumstances . . .'" exist); *In re Manville Forest Products Corp.*, 47 B.R. 955, 957 (S.D.N.Y. 1985) (movant failed to meet the three statutory requirements, and "in addition, [movant] failed to demonstrate that this case involves 'exceptional circumstances' that would justify immediate review"); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1028-29 (9th Cir.), *dismissed sub nom. Arizona v. United States District Court for the Dist. of Arizona*, 459 U.S. 961 (1982), *aff'd sum nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983) (appellate court disagreed with district court's finding that there was a control-

ling issue of law, because the issue of law did not implement the policy of applying § 1292(b) only in exceptional cases).

Other federal courts equate "exceptional circumstances" with the three statutory requirements. The court in *United States v. L.J. Garner*, 749 F.2d 281, 286 (5th Cir. 1985), for example, declined to review a certified order, which barred the United States from proceeding with its judicial foreclosure action until it promulgated appropriate regulations. The sole basis for the appellate court's denial was that the United States did not file a timely application for interlocutory appeal. *Id.* at 286. Prior to declining review, however, the court stated that the "exceptional cases" in which interlocutory appeals were sought to be permitted under § 1292(b) are cases where the three statutory requirements have been met. *Id. See also Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3rd Cir. 1958) (the statutory "built-in safeguards" ensure that interlocutory appeals are only granted in exceptional circumstances); *Smith v. Ford Motor Co.*, 908 F. Supp. 590, 599 (N.D. Ind. 1995) (court "must consider three [statutory] factors when considering a motion for certification," and where the first statutory requirement is not met— where no controlling issue of law exists — movant fails to show exceptional circumstances to justify certification); *White v. Nix*, 43 F.3d 374, 376-77 (8th Cir. 1994) (court required showing of exceptional circumstances and held that movant failed to satisfy any of the "three established statutory criteria"); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated sub nom. Papas v. Zoecon Corp.*, 505 U.S. 1215 (1992), *on remand*, 985 F.2d 516 (11th Cir.), *cert. denied, sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993) (Eleventh Circuit Court of Appeals granted petition to appeal under § 1292(b) and held that state common law tort claims for inadequate labeling are impliedly preempted by FIFRA); *Lynch v. Johns-Manville Sales Corp.*, 701 F.2d 44, 45 (6th Cir. 1983) ("strict compliance with the statutory provisions [] permit such [exceptional cases]").

In the present case, the District Court was satisfied that the three statutory requirements set forth in 1292(b) were met. The Court of Appeals denied Clorox's request for an interlocutory appeal. Although an appellate court is not required to state its reason for denying a 1292(b) application, the Court of Appeals did state that "exceptional circumstances" did not exist to justify an interlocutory appeal. App. A, p. A-1. The Court of Appeals did not disagree with the District Court's finding that Clorox demonstrated that there was a controlling issue of law about which there is a difference of opinion and that resolution of the issue would materially advance the litigation. Instead, the Court of Appeals applied the wrong standard: it felt constrained by a pre-requisite, which is not in the statute, that it first determine that the case is "exceptional" before it would be free to exercise its discretion.

Had Clorox known that there was a fourth factor to be met, then it would have made that showing. The effect of the Court of Appeals' mistaken be lief that Clorox had to satisfy the requirements of § 1292(b) *and* show "exceptional circumstances" was to deny Clorox advance notice of the standard which would be applied to its petition.

CONCLUSION

For the foregoing reasons, Clorox respectfully requests that this Court issue a Writ of Certiorari to resolve the inconsistent application of 28 U.S.C. § 1292(b) in the federal courts.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-8031

September Term, 1996
94cv01938

Vanessa Haile,
Respondent

v.

The Clorox Company,
Petitioner

BEFORE: Silberman, Randolph, and Rogers, Circuit Judges

ORDER

Upon consideration of the petition for permission to appeal, the motion for leave to file late answer, cross petition, and statement of facts, the answer, cross petition, and statement of facts, the motion for leave to file reply memorandum, the reply memorandum, and defendant-appellant's reply memorandum in opposition to the cross petition, it is

ORDERED that the motions for leave to file be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that the petition for permission to appeal be denied. The case does not present exceptional circumstances that would justify an immediate appeal. *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978). It is

FURTHER ORDERED that the cross petition be denied.

Since no appeal has been allowed, no mandate shall issue.

Per Curiam

/s/_____

/s/_____

/s/_____

Dated: *November 25, 1996*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1938 (NJH)

VANESSA HAILE,
Plaintiff,

v.

THE CLOROX COMPANY,
Defendant.

AMENDMENT OF ORDER DATED AUGUST 6, 1996

On August 6, 1996, the Court issued a Memorandum Opinion and Order in this case denying the first, second, and fourth summary judgment motions of defendant and the cross-motion for summary judgment of plaintiff. In its Memorandum Opinion, the court held that FIFRA did not preempt plaintiff's failure to warn and negligent testing claims. In so holding, the Court stated that although it could not "overlook the profound effect *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), has had in other Circuits on claims similar to planitiff's," Memorandum Opinion at 4, the decision of the Court of Appeals for this Circuit in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), "has direct application to this case, and rests, at least in part, on reasons not rejected by the Supreme Court in *Cipollone*. Accordingly, the Court . . . leaves to the Court of Appeals for this Circuit the prerogative of overruling its own decisions." Memorandum Opinion at 5.

The Court finds that its holding with respect to FIFRA preemption involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termina-

tion of this litigation. *See* 28 U.S.C. § 1292(b) (1994). Accordingly, it is this 26th day of September 1996,

ORDERED that the Order of the Court dated August 6, 1996, be, and hereby is, amended to include this statement: "The Court hereby certifies that, insofar as this Order considers FIFRA preemption, the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation."

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1938 (NHJ)

VANESSA HAILE,
Plaintiff,

v.

THE CLOROX COMPANY,
Defendant.

ORDER

Presently before the Court are the five motions for summary judgment of defendant and the cross-motion of plaintiff for summary judgment. Upon consideration of the motions, memoranda in support and opposition, and for the reasons set forth in a Memorandum Opinion issued on this date, it is this 6th day of August 1996,

ORDERED that defendant's third [#36] and fifth motion [#38] for summary judgment be, and hereby are, granted; it is further

ORDERED that defendant's first [#34], second [#35], and fourth [#37] motions for summary judgment be, and hereby are, denied; it is further

ORDERED that plaintiff's cross-motion for summary judgment [#61] be, and hereby is, denied; it is further

ORDERED that plaintiff's claim under the Federal Hazardous Substances Labeling Act be, and hereby is, dismissed; it is further

ORDERED that plaintiff's claim of product defects resulting from an improper manufacturing process be, and hereby is, dismissed; it is further

ORDERED that plaintiff's claim of violations under District of Columbia statutes, rules and regulations be, and hereby is, dismissed; it is further

ORDERED that this matter be, and hereby is, set for trial at 2 p.m. on November 12, 1996; and it is further

ORDERED that the parties be, and hereby are, advised that the Court will conduct a Settlement Conference at 2 p.m. on the day of trial; principals with settlement authority must be present or available by telephone at that time.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1938 (NHJ)

VANESSA HAILE,
Plaintiff,

v.

THE CLOROX COMPANY,
Defendant.

MEMORANDUM OPINION

Plaintiff Vanessa Haile seeks compensatory and punitive damages for burns and other injuries sustained in an explosion allegedly caused by her use of Combat Room Fogger, a pesticide owned and distributed by Kingsford Products Company ("Kingsford"). Kingsford is a wholly-owned subsidiary of defendant The Clorox Company ("Clorox"). Relying on District of Columbia tort and contract law, plaintiff claims that defendant should be held liable under theories of strict liability, gross negligence, negligence, and breach of implied warranties of merchantability and fitness for a particular purpose. Before the Court are the five motions for summary judgment of defendant and the cross-motion of plaintiff for summary judgment. Upon consideration of the motions, memoranda in support and opposition, and for the reasons set forth below, the Court will grant defendant's third and fifth motions for summary judgment and deny the motions in all other respects.

I. *BACKGROUND*

Plaintiff alleges the following facts. On August 13, 1991, plaintiff set off a can of Combat Room Fogger ("Combat") in her kitchen and left the room. When she returned to the kitchen, the product caused a fire and explosion. The force of the explosion blew a door off the kitchen cabinet and knocked plaintiff to the

ground. As a result, plaintiff sustained burns over 14% of her body, including second degree burns of plaintiff's lower extremities and chemical burns on her face. Some of these burns required skin grafts. Plaintiff claims that Combat had inadequate warnings on its label and surrounding packaging, and did not provide adequate instructions for use. Plaintiff also claims that Combat is an inherently dangerous product that has been improperly designed and tested.

Combat is an insecticide that is sold in an aerosol can. The entire contents of the can are expelled at one time. This method of product delivery creates an insecticide "fog" that penetrates cracks and other difficult-to-reach areas. It is undisputed that Combat contains, among other ingredients, a highly flammable propellant. It is also undisputed that, at the time of the events alleged in this complaint, neither defendant nor Kingsford warned users that Combat contains flammable ingredients or that an explosion or fire could result from use of the product.

II. *Defendant's Motions for Summary Judgment*

In its first motion for summary judgment, defendant argues that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1994), preempts plaintiff's failure to warn and negligent testing claims. Under FIFRA, all insecticides must be registered with the Environmental Protection Agency ("EPA"). Because registered insecticides must have EPA approved labels, a copy of the proposed label must be included with the registration application. 40 C.F.R. § 152.50 (1995). EPA regulations set forth various labeling requirements governing the content and placement of labels, including, *inter alia*, the name of the product, the name of the producer, the net contents, the registration numbers for the product and for the producing establishment, an ingredient statement, warning or precautionary statements, directions for use, and whether the product is classified for general or restricted use. *See* 40 C.F.R. § 152-156 (1995).

Under FIFRA, a "state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (1994). Defendant contends that an action for failure to warn brought under state common law is precisely the type of state "labeling requirement" prohibited by FIFRA, and thus, plaintiff's claim is preempted by federal law. Although the Court of Appeals for this Circuit determined in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), that FIFRA does not preempt state common law damage claims, defendant further contends that *Ferebee* is no longer good law in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

The product at issue in *Cipollone* was cigarettes. The Supreme Court considered whether plaintiff's failure to warn claims were preempted by the Federal Cigarette Labeling and Advertising Act (the "1965 Cigarette Act"), or by its successor, the Public Health and Cigarette Smoking Act of 1969, (the "1969 Cigarette Act"). The 1965 Cigarette Act provided that:

> No *statement* relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

1965 Cigarette Act, Pub. L. 89-92, § 5, 79 Stat. 282 (current version at 15 U.S.C. § 1334(a) (1994)) (underline added). The 1969 Cigarette Act replaced the preemption requirement in the 1965 Cigarette Act with a provision that reads:

> No *requirement or prohibition* based on smoking and health shall be imposed *under State law* with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(a) (1994) (underline added). The Supreme Court found that the preemption clauses in the two Acts had different effects: while the phrase "no statement" in the 1965 Cigarette Act did not preempt state damage actions, *Cipollone*, 505 U.S. at 518-20, the phrase "no requirement of prohibition . . . under state law" in the 1969 Cigarette Act does preempt state damage actions. *Id.* at 520-24. The Supreme Court held that the later preemption clause prohibited both positive state enactments and state common law liability rules.

Although the Court cannot overlook the profound effect *Cipollone* has had in other Circuits on claims similar to plaintiff's, *see e.g.*, *Burke v. Dow Chemical Co.*, 797 F.Supp. 1128, 1139 (E.D.N.Y. 1992) (citimg post-*Cipollone* decisions rejecting *Ferebee*), *Ferebee* remains the law of this Circuit. FIFRA's preemption is not as expansive as the "requirement or prohibition . . . under state law" in the 1969 Cigarette Act. The FIFRA preemption clause, like the preemption clause in the 1965 Cigarette Act, does not include the phrase "under state law." The omission of this phrase is significant. In concluding that the 1969 Cigarette Act preempts state common law actions, the Supreme Court construed "state law" to "include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522-23.

The Court is persuaded that *Cipollone*'s holding, because it is context specific, should be construed narrowly. In finding that the 1969 Cigarette Act preempts state law damage actions, the Supreme Court noted that "[a]lthough the presumption against preemption might give good reason to construe the phrase `state law' in a preemptive provision more narrowly than an identical phrase in another context, *in this case* such a construction is not appropriate." *Cipollone*, 505 U.S. at 522 (italics added).

The regulatory framework in FIFRA bears no resemblance to the framework of the 1969 Cigarette Act. For example, the 1969 Cigarette Act imposes a regulatory ceiling that unabashedly

occupies the field. In contrast, under FIFRA, a state may "regulate the sale or use of any federally registered pesticide or device in the State" so long as state regulation does not permit uses that are prohibited by FIFRA. 7 U.S.C. § 136v(a) (1994). Thus, unlike the 1969 Cigarette Act, FIFRA's regulation of products serves as a "floor of safe conduct," and is not a "ceiling on the ability of states to protect their citizens." *See Ferebee*, 736 F.2d at 1543.

Ferebee has direct application to this case, and rests, at least in part, on reasons not rejected by the Supreme Court in *Cipollone*. Having considered the state's right to regulate product use under FIFRA, the *Ferebee* Court held that "if a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some of these injuries from use of a pesticide, federal law stands as no barrier." *Ferebee* at 1541 (italics omitted). As the 1969 Cigarette Act does not provide for state regulation of product use, the Supreme Court had no reason to address this argument in *Cipollone*. Accordingly, the Court finds that FIFRA does not preempt plaintiff's state law damage claims and leaves to the Court of Appeals of this Circuit the prerogative of overruling its own decisions.

Clorox argues in its second motion for summary judgment that plaintiff's design defect claims are precluded by District of Columbia product liability law, negligence law, and warranty law. Clorox's motion is primarily based upon two arguments: first, that the "adequate product label on Combat renders the product non-defective in design"; and second, that defendant "was not required to anticipate and make the product safe for misuse such as plaintiff's failure to follow the product instructions." Def.'s Rep. Mem. Third Mot. Summ. J. at 2. The Court finds that genuine issues of material fact exist with respect to whether, *inter alia*, the product label was adequate, whether the product was safe for its intended use, and whether plaintiff used the product in a reasonably foreseeable manner. A finder of fact

could reasonably resolve these issues in favor of either party. *See* Fed. R. Civ. P. 56. The Court will deny defendant's second motion for summary judgment.

In the third motion for summary judgment, defendant argues that plaintiff has not made out a claim for violation of the Federal Hazardous Substances Labeling Act. As plaintiff concedes this argument, Pl.'s Resp. to Def.'s Third Mot. Summ. J., the Court will grant defendant's third motion for summary judgment and dismiss Count V of the complaint.

Defendant next contends that plaintiff cannot proffer admissible expert testimony to support her design defect claim. It is undisputed that plaintiff will offer Wilbur Boyer, a chemist, as her sole expert on the product design claim. Defendant argues that Boyer "lacks the background, training, and scientific knowledge necessary to offer an opinion on design issues." Def.'s Rep. Mem. Fourth Mot. Summ. J. at 3. Because the Court agrees with plaintiff that this issue should be decided at the time of trial, it will deny defendant's fourth motion for summary judgment without prejudice.

Defendant attempts to address plaintiff's remaining claims in a fifth motion for summary judgment. It is not clear what plaintiff's remaining claims are, but to the extent that plaintiff alleges that product defects resulted from an improper manufacturing process, the Court will dismiss these claims. Plaintiff has failed to present any evidence to defeat a summary judgment motion on a manufacturing defect claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Plaintiff's "failure to obey the laws and rules and regulations of the District of Columbia" claim must also fail. Plaintiff has not identified the District of Columbia statutes, rules, and regulations allegedly violated by defendant. The Court will grant defendant's fifth summary judgment motion.

III. *Plaintiff's Cross-Motion for Summary Judgment*

In 1994, an Arizona jury in *Rodriguez v. American Cyanamid Co.*, 858 F.Supp. 127 (D. Ariz. 1994), awarded punitive damages in a case where three Combat Room Foggers exploded inside a mobile home. Plaintiff contends that because defendant relies on the EPA registration of American Cyanamid Company, a defendant in the *Rodriguez* case, Clorox should be held liable in this action on the grounds of offensive collateral estoppel.

Under the doctrine of offensive collateral estoppel, "a defendant is precluded from relitigating identical issues that the defendant litigated and lost against another plaintiff." *Jack Fawcett Assoc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). The doctrine is "detailed, difficult, and potentially dangerous." *Id.* Before a party may preclude relitigation of an issue, three conditions must be met: (1) the issue must have been contested by the parties and submitted for determination by the court; (2) the issue must have been actually determined by the court; and (3) preclusion must not work unfairness. *Id.* at 125.

Offensive collateral estoppel simply is not appropriate in this case. First, plaintiff has not shown that the facts in this tort case are the same as the facts in *Rodriguez*. Second, plaintiff has not provided the Court with materials from which it might discern whether the issues contested by the parties and determined on the merits in the *Rodriguez* action are the same as the issues currently before the Court. And finally, although defendant Clorox may indeed have succeeded to American Cyanamid's registration of Combat with the EPA, plaintiff has stretched the doctrine of offensive collateral estoppel beyond recognition. Because Clorox was not a party in the *Rodriguez* case, Clorox is not relitigating issues that it litigated and lost in an earlier action. The Court finds that granting judgment for plaintiff on the grounds of offensive collateral estoppel would work great unfairness in this case.

Plaintiff also argues that the Court should find as a matter of law that Combat is defective and unreasonably dangerous. As the Court addressed this same issue in its discussion of defendant's second motion for summary judgment above, it need not repeat that analysis here. The Court finds that genuine issues of material fact exist with respect to whether Combat is defective and unreasonably dangerous and that a finder of fact could reasonably resolve this issue in favor of either party. The Court will deny plaintiff's cross-motion for summary judgment.

An appropriate Order will issue on this date.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES
DISTRICT JUDGE

Dated: *August 6, 1996*